IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIG INSURANCE CO.,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
MECO CONSTRUCTORS, INC.,	:	
	:	
Defendants.	:	**NO. 97-3162**
	:	

Reed, S.J. **January 24, 2000**

M E M O R A N D U M

Now before this Court is the unopposed motion of plaintiff TIG Insurance Company for summary judgment (Document No. 10) in this declaratory judgment claim against defendant MECO Constructors, Inc. Upon consideration of the motion, memorandum of law, and the record pursuant to Rule 56 of the Federal Rules of Civil Procedure, the motion of plaintiff will be granted.

I. BACKGROUND

This is a declaratory judgment action arising out of a civil case now before the Superior Court of New Jersey in which defendant MECO Constructors, Inc., ("MECO") has been named a third-party defendant (Pennsauken Solid Waste Management Authority v. New Jersey, No. L-133345-91 (Sup. Ct. N.J. Camden Cty. 1996)). In the underlying case, a waste management company called Quick-Way is being sued for allegedly disposing of toxic and/or hazardous wastes at the Pennsauken Sanitary Landfill in Camden County, New Jersey. MECO is one of a number of companies whose waste Quick-Way hauled in the 1980s, and MECO is among the more than 200 clients Quick-Way has named as third-party defendants in the underlying case.

According to TIG, in March 1997, MECO claimed that it was insured through TIG during time period relevant to the New Jersey suit (1982-85) and that TIG therefore had a duty to defend and indemnify MECO in that action. TIG commenced an internal investigation to determine whether any such policy existed and discovered none. TIG also contacted MECO and requested copies of the TIG insurance policy or policies allegedly held by MECO. TIG was advised by MECO representatives that it could not provide any copies of TIG insurance policies or policy numbers or any other proof that MECO was insured by TIG. MECO suggested that the Scanlon Insurance Agency was in possession of MECO's insurance information, but upon inquiry by TIG, no such information was forthcoming.

TIG therefore brings this declaratory judgment action under 28 U.S.C. § 2201, seeking a declaration of no coverage on the basis of the non-existence of a policy agreement between TIG and MECO. Despite having been served with notice of the written motion (Affidavit of Service of Wendy H. Koch, Aug. 25, 1999) and having requested and been granted additional time to respond, MECO has not responded to the instant motion. This Court has diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332, based upon diversity of citizenship and the requisite amount in controversy.

II. ANALYSIS

Under Rule 56(c) of the Federal Rules of Civil Procedure, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," then a motion for summary judgment must be granted. See Anderson v. Liberty Lobby, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2511 (1986).

The moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Id. at 324, 106 S. Ct. at 2553.

A court may grant an unopposed motion for summary judgment where it is "appropriate." Fed. R. Civ. P. 56 (e). The Court of Appeals for the Third Circuit has observed that upon consideration of an unopposed motion for summary judgment,

> [w]here the moving party has the burden of proof on the relevant issues, this means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Where the moving party does not have the burden of proof on the relevant issues, this means that the district court must determine that the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law.

Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990).

Plaintiff suggests that the law of New Jersey or Pennsylvania may apply to this action. However, this Court need not choose between the laws of the two states, because the result is the same regardless of the law applied.

Under both Pennsylvania and New Jersey law, the party seeking the benefits of a lost contract bears the burden of establishing the existence or issuance of the contract and the terms of that contract by at least a preponderance of the evidence. See Compass Tech., Inc. v. Tseng

Lab., Inc., 71 F.3d 1125, 1133 (3d Cir. 1995); Baker v. Aetna Cas. & Sur. Co., No. 86-4974, 1996 U.S. Dist. LEXIS 11600, at * 47-48 (D.N.J. Aug. 5, 1996).[1] Defendant MECO, then, would bear the burden at trial of proving the contents of the policy under which MECO claims TIG must indemnify and defend MECO.[2] Yet MECO has produced far less than a preponderance of the evidence that it held a policy with TIG; MECO has produced no evidence at all. Whether Pennsylvania law or New Jersey law is applied, MECO will not prevail because it has not come

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[1] In Pennsylvania, a party seeking to recover on a lost instrument must prove its existence and its contents by clear and convincing evidence. See Compass Technology, 71 F.3d at 1133 (3d Cir. 1995) (citing Mahoney v. Collman, 293 Pa. 478, 482, 143 A. 186, 187 (1928)). In New Jersey, the burden is normally preponderance of the evidence, but can be a clear and convincing evidence in certain circumstances. See Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 1425-26 (D. Del. 1992). Regardless of the burden applied, the result is the same in this case, because the party seeking recovery under the instrument, the defendant MECO, has made no showing whatsoever that it held an insurance policy with TIG during the relevant time period, nor has it produced any evidence of the contents of such a policy.

[2] Placing the burden on defendant in this declaratory judgment action is not anomalous. An insurer who seeks a declaration of no coverage does not always bear the burden of proof, even when, as here, the insurer is the plaintiff. The Court of Appeals for the Third Circuit suggests that courts consider four factors in determining which party bears the burden of proof in a declaratory judgment action: (1) whether plaintiff has objected to assuming the burden of proof; (2) which party asserted the affirmative of the issue; (3) which party would lose in the absence of any evidence on the issue; and (4) what sort of relief is sought. See Am. & Foreign Ins. Co v. Phoenix Petroleum Co., No. 97-3349, 1998 U.S. Dist. LEXIS 20411, at * 9 (E.D. Pa. Dec. 23, 1998) (citing Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1161 (3d Cir. 1976), cert. denied, 429 U.S. 1053, 97 S. Ct. 767 (1977)).

While plaintiff has not objected to assuming the burden under the first factor, plaintiff prevails under the second factor because essentially defendant MECO is seeking coverage and TIG is denying liability. See Fireman's Fund, 540 F.2d at 1176 ("Even though the insurer has initiated this declaratory judgment action ..., we adhere to the fundamental rule that 'the risk of non-persuasion rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue... .'"). Third, MECO would lose this declaratory judgment action if no evidence were brought forward, because it must, at the very least, establish that it held a policy with TIG in order to defeat TIG's contention that it owes MECO no coverage. Finally, plaintiff seeks only a declaration that it need not defend or otherwise cover MECO; no monetary damages are sought against MECO. Thus, under the factors set forth by the Court of Appeals for the Third Circuit, defendant would bear the burden of proving the issue of the existence of the policy at trial.

forward with any argument or evidence on the motion now before this Court.

Plaintiff, on the other hand, has produced clear, convincing, unrefuted evidence that no policy agreement between TIG and MECO existed during the relevant time period. The affidavit of Martin Weisman, claims analyst for TIG, describes TIG's investigation of its own records into whether MECO ever held a policy from TIG, and TIG's futile efforts to obtain information from MECO concerning the alleged policy. (Affidavit of Martin Weisman, TIG Claims Analyst, Aug. 17, 1999, attached to Plaintiff, TIG Insurance Company's, Motion for Summary Judgment Against Defendant MECO Constructors, Inc.). On March 17, 1997, TIG contacted Scanlon Insurance Agency, which apparently handles insurance matters for MECO, and TIG was advised that Scanlon had no records of any policy agreement between TIG and MECO during the relevant period. (Weisman Affidavit, at ¶ 5). TIG sent a letter to MECO advising it of TIG's inability to obtain policy information from Scanlon. (Id., at ¶ 6). A MECO representative told a TIG representative that MECO had no TIG policies, policy numbers, policy information, or records for 1982-85. (Id., at ¶ 7). After being referred back to Scanlon Insurance Agency, TIG was again unable to obtain any information regarding alleged policies between TIG and MECO for the relevant time period. (Id., at ¶ 8). A review of internal TIG records revealed no policies issued to MECO. (Id., at ¶ 10).

Furthermore, counsel for defendant promised this Court that he would investigate the matter, and assured the Court that if he found that no insurance policy ever existed, MECO would dismiss the case against TIG. (Letter from John Harrington, Counsel for MECO, Oct. 21 1997). The Court has no record of any correspondence with Mr. Harrington concerning the existence of a policy since that letter was received, more than 2 years ago.

III. CONCLUSION

Plaintiff has produced substantial evidence that no policy ever existed between MECO and TIG, and defendant has produced no evidence in rebuttal. Thus, I conclude that the deficiencies in defendant's evidence entitle plaintiff TIG to judgment as a matter of law. See Anchorage Assoc., 922 F.2d at 175.

An appropriate Order follows.

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Defendants.	:	**NO. 97-3162**
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O R D E R

AND NOW, this 24th day of January, 2000, upon consideration of the motion of plaintiff TIG Insurance Company, Inc., for summary judgment (Document No. 10), and having examined the motion, memorandum and the record pursuant to Rule 56 of the Federal Rules of Civil Procedure, and having found that there are no genuine issues of material fact and that plaintiff is entitled to judgment as a matter of law, for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of plaintiff is **GRANTED**.

IT IS FURTHER ORDERED that judgment is hereby entered in favor of TIG Insurance Co and against MECO Constructors, Inc.

IT IS HEREBY DECLARED, pursuant to 28 U.S.C. § 2201, that TIG Insurance Company is not required to provide coverage to MECO or defend MECO in the action filed against MECO in the Superior Court of New Jersey, Pennsauken Solid Waste Management Authority v. New Jersey, No. L-133345-91 (Sup. Ct. N.J. Camden Cty. 1996).

This is a final Order. The Clerk is directed to close this file.

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LOWELL A. REED, JR., S.J.